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No. 07-501

IN THE

Supreme Court of the United States

MARILYN SHIRLEY AND RAYMOND DOUGLAS SHIRLEY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Congress amended the Federal Tort Claims Act ("FTCA") in 1974 to accept sovereign liability for the intentional torts of law enforcement officers. *See* 28 U.S.C. § 2680(h). As petitioners demonstrate in their opening brief, this extension of FTCA coverage is rendered largely inoperative if — as in the decision below — courts uncritically incorporate state law to define "scope of employment" under the FTCA. Pet. 16-19. But that dysfunctional result is compelled, according to some courts (and the government here), by this Court's 1955 two-sentence *per curiam* decision in *Williams v. United States*, 350 U.S. 857 ("*Williams*"). That tension has led to increasing confusion among federal courts over the proper relationship between federal and state law in construing the FTCA. And the government does not — and cannot plausibly — deny the host of practical problems that have arisen as a result of *Williams*, a decision the government opposed in 1955 and does not attempt to defend today.

1. The government instead claims review is unwarranted because petitioners did not argue below that the district court erred in applying Texas law to abrogate the federal waiver of immunity in 28 U.S.C. § 2680(h). Opp'n 6-7. The government is mistaken. In a petition for rehearing before the court of appeals, petitioners cited this Court's decision in *United States v. Muniz*, 374 U.S. 150 (1963), and argued that a federal court cannot "appl[y] [state law] to defeat th[e] federal statutory coverage" of the FTCA. Pet. for Reh'g 9-10. Petitioners then explained that the district court's application of state law to determine "scope of

employment" was "necessarily erroneous" because it ensured that "misconduct by law enforcement officers for which the United States is made liable by § 2680(h) would never be covered." *Id. at* 9-10. That is precisely the argument petitioners now raise before this Court. Pet. 16-20 (discussing, *inter alia*, *Muniz*); *see id.* at 12 (describing petition for rehearing). Contrary to the government's claims, therefore, the argument for interpreting the FTCA in a way that gives meaningful effect to its 1974 amendment was, indeed, pressed below and is properly reviewed by this Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (review proper if pressed or passed upon below). What is more, it is the *issue* presented, not necessarily the arguments advanced in support of a petitioner's position on that issue, that must ordinarily have been presented in the court below. *See* Robert L. Stern, et al., *Supreme Court Practice* 421 (8th ed. 2002) (discussing general practice and its exceptions). The issue of the United States' vicarious liability for Officer Miller's on-duty rape of petitioner Marilyn Shirley has always been presented in this case.[1]

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[1] The government also alleges that petitioners "have again conceded[] [that] the court of appeals properly articulated the general test for scope of employment under Texas law," suggesting petitioners made such a concession in this Court. *See* Opp'n 13. Again, the government is wrong. The citation it provides is not to petitioners' brief, but to the court of appeals' decision in petitioners' appendix. *See* Opp'n 13 (citing Pet. App. 4a and Pet. App. 3a & n.3). In fact, petitioners have consistently argued that in light of the extraordinary authority exercised by law enforcement officers and the concomitant potential for abuse, state courts properly define officer assault as falling within the "scope of authority." Pet. 23-24 (citing *Doe*

2. The government next opposes review on the ground that the lower courts' application of state law to bar federal liability under § 2680(h) was "correct on the merits." Opp'n 6. For that proposition, the government relies primarily on this Court's decision in *Williams*. *Id.* at 7-8. But that argument begs the very question at issue here. The Court's *per curiam* opinion in *Williams* was issued roughly twenty years *before* Congress amended the FTCA in 1974 to waive the government's immunity for certain kinds of intentional torts committed by "law enforcement officers" "under color of Federal law." S. Rep. No. 93-588, at 3, 4 (1974); *see Ali v. Fed. Bureau of Prisons*, No. 06-9130, slip. op., at 1, 552 U.S. __ (Jan. 22, 2008) ("law enforcement officer" as defined in 28 U.S.C. § 2680(c) covers "all law enforcement officers," including "officers of the Federal Bureau of Prisons"). As petitioners explain in their opening brief, it is the juxtaposition of *Williams* with the subsequent 1974 amendment to 28 U.S.C. § 2680(h) that has created the problem at the heart of this case: that application of state-law "scope of employment" doctrines under *Williams* cannot be reconciled with the amended § 2680(h), designed to reach precisely those intentional torts most likely to fall outside state doctrines of "scope of employment." Pet. 16-19. Put differently, a citation to pre-1974 case law cannot answer the question whether "scope

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v. City of Chicago, 360 F.3d 667 (7th Cir. 2004)). In any event, of course, the issue before this Court is not whether the court of appeals properly construed Texas law — either the general test for scope of employment or its application in this special setting — but whether the court below erred when it construed the *FTCA* to incorporate a state-law rule of *respondeat superior* that would effectively abrogate § 2680(h). Pet. 16-20.

of employment" must be defined by reference to a federal standard, rather than varying state laws, in order to give meaningful effect to Congress' 1974 amendment.[2]

The government also argues that the "plain text" of 28 U.S.C. § 1346 compels a reading under which varying state standards govern federal liability for the intentional torts of federal law enforcement officers. Specifically, the government claims, without citation, that "this Court and every court of appeals has recognized that the most natural reading of the plain text of § 1346(b) incorporates state law to determine both whether an officer acts

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[2] Later in its brief, the government suggests that this Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), somehow clarifies that even after the 1974 amendment to § 2680(h), state law must continue to govern the "scope of employment" inquiry under FTCA § 1346(b)(1). Opp'n 12. That is incorrect. What the Court actually held in *Carlson* was that a *Bivens* action could go forward, in part because any FTCA claim for the same conduct would be available under § 1346(b)(1) "only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward." 466 U.S. at 23. But it is plain from § 1346(b)(1)'s reference to "the law of the place where [the act] occurred" — and was plain well before *Carlson* — that state law governs the type of torts for which a plaintiff may sue under the FTCA. *See* Pet. 13-15. The only question here — to which *Carlson* does not speak at all — is whether that same reference to "the law of the place where [the act] occurred" *also* governs determination of "scope of employment" under § 1346(b)(1). *See id.* If anything, the Court's failure in *Carlson* to specify that state law would govern "scope of employment" as well as the availability of a cause of action suggests that the Court regarded the determination of "scope" to be subject to federal law, or at least believed the question to be an open one.

'within the scope of his employment' and whether he 'would be liable to the claimant.'" Opp'n 11. As petitioners demonstrate in their opening brief, however, Pet. 13-14 & n.5, the "most natural" reading of the text is exactly to the contrary: § 1346's reference to state law modifies whether an officer "would be liable to the claimant," but *not* "scope of employment." And neither this Court nor the courts of appeals have actually parsed the language of § 1346 in the way the government posits. Neither of the two sentences in the *Williams per curiam* concerns itself with the text of § 1346, and the lower court cases cited by the government simply rely on *Williams* as having decided the matter and do not engage in any statutory interpretation of their own.[3]

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[3] *See* Opp'n 9; *Garcia v. United States*, 62 F.3d 126 (5th Cir. 1994) (per curiam) (citing *Williams*, 350 U.S. 857, with no reasoning or interpretation of statute itself); *Nelson v. United States*, 838 F.2d 1280, 1282 (D.C. Cir. 1988) (same); *Attallah v. United States*, 955 F.2d 776, 781 (1st Cir. 1992) (relying on a case citing *Williams* and not interpreting statute itself); *O'Toole v. United States*, 284 F.2d 792, 795 (2d. Cir. 1960) (describing *Williams* as resolving the issue and not interpreting the statute itself); *McSwain v. United States*, 422 F.2d 1086, 1088 (3d Cir. 1970) (citing *Williams* and not interpreting statute itself); *Cooner v. United States* 276 F.2d 220, 224 (4th Cir. 1960) (citing *Williams* as requiring the application of state law, noting that this has made the "pattern . . . reveal[ed] [by FTCA decisions] . . . somewhat confused," and not interpreting statute itself); *Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993) (citing *Williams* and a case that cites *Williams*, with no interpretation of statute itself); *Duffy v. United States*, 966 F.2d 307, 314 (7th Cir. 1992) (citing *Williams* and not interpreting the statute itself); *Piper v. United States*, 887 F.2d 861, 863 (8th Cir. 1989) (same); *Washington v. United States*, 868 F.2d 332, 334 (9th Cir. 1989) (citing case that cites

Though the government stretches to find that the courts have fully settled on the incorporation of state law to define "scope of employment" under the FTCA, it notably fails to defend the reasoning or the results of the decisions on which it relies. The government certainly does not explain why it has changed its own position on the matter. In *Williams*, the government argued to this Court that the FTCA "adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the government to its employees," Br. for the United States, No. 24, Oct. Term 1955, at 36 (quoting *United States v. Sharpe*, 189 F. 2d 239, 241 (4th Cir. 1951)), and, moreover, that it "would hardly be . . . rational" to adopt any other rule, *id.* The government makes no effort to explain why it has now become "rational" to "subject the employment relationship between the Government and its employees to the force of . . . dissimilar and frequently irreconcilable [state] statutes and decisions." *Id.* (citing *Feres v. United States*, 340 U.S. 135, 143 (1950)).[4]

Nor does the government address the very substantial difficulties facing courts that must determine the contours of state "scope of

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Williams, *see Lutz v. United States*, 685 F.2d 1178, 1182 (9th Cir. 1982), and not interpreting statute itself); *Pattno v. United States*, 311 F.2d 604, 607 (10th Cir. 1962) (citing *Williams* and not interpreting statute itself); *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1542 (11th Cir. 1990) (same), amended on other grounds by 924 F.2d 1555 (11th Cir. 1991).

[4] Indeed, cases decided since *Williams* only lend force to the government's original contention that federal employment laws should implement uniform national standards of *respondeat superior*. *See* Pet. 26 n.8.

employment" doctrine in this context. Especially in the several states that have excluded the intentional torts of law enforcement officers from their own waivers of sovereign immunity, there is no "workable" body of state law to which courts may turn to determine scope of employment. Rather, these courts are left to apply state doctrines of *respondeat superior* developed in very different contexts to the unique problems presented when correctional officers abuse their virtually unchecked authority over their charges. Pet. 20-22. The government neither denies that this is a serious problem nor proposes any solution.

Most fundamentally, the government does not (and could not) deny that uncritical application of state law to the "scope of employment" inquiry under § 1346(b)(1) will regularly read out of the FTCA the very torts for which the 1974 Congress was most concerned with assuming liability.[5] Such a result is irreconcilable with this Court's decisions in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *Muniz*, 374 U.S. 150, which make clear that the FTCA must be construed so that the vagaries of state law do not stand as an obstacle to accomplishment of its goals. *See* Pet. 18. The government attempts to minimize those decisions by reading them to address only the incorporation of "state *immunity* laws for government actors." Opp'n

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[5] *See* Pet. 17 (describing torts for which government could not be held liable under state law); *see also United States v. Neustadt*, 366 U.S. 696, 707 (1961) ("Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act" governing liability for those harms).

9 n.2 (emphasis added). But this Court has not been so stingy with its precedent[6]—and with good reason. The recognition that the FTCA is not "self-defeating," *Indian Towing*, 350 U.S. at 65, is but a straightforward application of the basic tenet, long applied by this Court, that, even where a federal statute incorporates state law for a rule of decision, the state law applies only to the extent that it is consistent with the federal policy underlying the cause of action and does not cause "the prohibition of [the] federal statute . . . [to] be set at naught." *Burks v. Lasker*, 441 U.S. 471, 480 n.6 (1979) (internal quotation marks omitted); *see* Pet. 19.

3. In addition to making its merits arguments — which, of course, are more appropriately explored if and when this Court grants review — the government insists that there is no division of lower court authority and thus no justification for certiorari review. Opp'n 8-9. Again, the government is wrong.

First, a number of lower courts have indeed expressed confusion over the impact of the 1974 amendment on the use of state law to define "scope of employment." *See* Pet. 15-19. The government misses the mark when it characterizes the debate in *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc, 6-5), for example, as a purely state-law quarrel. *See* Opp'n 8. In fact, the very heart of the dispute between the majority and the dissent in

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[6] *See Neustadt*, 366 U.S. at 708 (construing the word "misrepresentation" in Section 2680(h) and quoting *Indian Towing* for the proposition that "[t]here is nothing in the Tort Claims Act which shows that Congress intended to draw . . . finespun and capricious [distinctions]" in liability).

that case was whether, in light of "Congress['] inten[t] . . . to include [law enforcement officers'] intentional torts within the liability of the government," *Primeaux,* 181 F.3d at 885 (Lay, J., dissenting), the court could properly cabin the government's liability to a limited "scope of employment" under state law, or whether the 1974 amendment required application of a broader doctrine of *respondeat superior* under which the government would have been liable for the sexual assault committed by the defendant officer. *See id.* at 878 (majority opinion); *id.* at 882 & nn.1, 2, 885 (Lay, J., dissenting).

Second, to the extent that lower courts have not more successfully addressed the problems caused by the incorporation of state-law standards into the FTCA's "scope of employment" requirement, and the conflict over the interpretation of § 1346(b)(1) and the 1974 amendment is not greater, it is, as the government suggests, because this Court's decision in *Williams* has stood as an obstacle to meaningful development of the law in that area. This is the rare case in which the absence of a deeper conflict only confirms the necessity for this Court's prompt review: Without guidance from this Court on how — if at all — *Williams* can be reconciled with the subsequent 1974 amendment of the FTCA, the lower courts are left with no room to develop their own solutions to the problem. Though the Court need not overrule *Williams* in order to find for petitioners here, *see* Pet. 17 n.6, this case does present the Court with an excellent vehicle for revisiting *Williams* in light of the 1974 amendment, in order to ensure that the FTCA is construed in a manner that effectuates

rather than frustrates Congress's undisputed intent when it waived the United States' immunity for the intentional torts of its law enforcement officers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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